SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 North King Street, Suite 10400
Wilmington, Delaware 19801-3733
(302) 255-0664

Bartholomew J. Dalton, Esquire
Dalton & Associates, P.A.
Cool Spring Meeting House
1106 West 10th Street
Wilmington, Delaware 19806
Attorney for Plaintiff

David G. Culley, Esquire
Tybout, Redfearn & Pell
750 South Madison Street
P.O. Box 2092
Wilmington, Delaware 19899
Attorney for Defendant Andrew J. Trala

Via facsimile and U.S. Mail

Re: **Guinn, et al. v. Trala, et al.**
C.A. No. 03C-12-265 RRC

Submitted: April 11, 2006
Decided: April 17, 2006

Dear Counsel:

The issue before the Court in this motor vehicle personal injury case is whether Defendant Andrew Trala may call (over Plaintiffs' objection, and as Defendant's own expert) an expert witness originally retained by Plaintiffs but who Plaintiffs will not call to testify at trial. The expert in question, William Sherkey, does not object to testifying on Defendant's behalf. Defendant is expected to call another expert, Joseph Aube, to testify as to the same conclusions that Sherkey has reached. Defendant expects that Plaintiffs will challenge Corporal Aube's conclusions. For the reasons below, Defendant Trala's application is **GRANTED.**

Defendant Trala argues that he should be allowed to call Plaintiffs' expert, William Sherkey, an accident reconstruction expert, at trial because 1) Sherkey has "unique" information regarding whether some of the lights on Defendant's snowplow were functioning at the time of the accident, which may prove to be important on the issue of Defendant Trala's possible negligence, 2) Sherkey has indicated that he will voluntarily testify on Defendant Trala's behalf if so called at trial, and 3) Sherkey's testimony would be limited to the "four corners" of his expert report, which has been already produced to Defendants through discovery.

Plaintiffs, on the other hand, argue that Defendant Trala should not be allowed to call Sherkey as an expert witness at trial because 1) "[t]he defense has made it clear that they want to use Sherkey as just another expert to buttress the experts they already have[,]"[1] and 2) such an act would result in a breach of loyalty by Sherkey. Plaintiffs also intend to call their own accident reconstruction expert, Dr. David Schorr, who is expected to testify that the lights on the snowplow driven by Trala were not fully functional, counter to the expected testimony of Sherkey. Sherkey was originally retained by Plaintiffs' prior counsel.

Although it has been recognized that, under some circumstances, there may be some breach of a duty of loyalty owed to a party by an expert witness[2], the Court does not find that situation controlling here. One Delaware court has recognized that where the expert "voice[s] no objection to appearing as [the other side's] witness it may be assumed that he perceived no ethical restriction on doing so."[3] As Sherkey has "voiced no objection" to his being called by Defendant Trala at trial, this Court will assume that Sherkey "perceive[s] no ethical restriction on doing so."

The leading Delaware case of *Pinkett v. Brittingham* provides a basis for Defendant Trala to call Sherkey to testify on Defendant's behalf in this

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[1] Letter to the Court from Bartholomew J. Dalton, Esq., at 1 (April 11, 2006).

[2] *Schmidt v. Hobbs*, 1988 WL 31989, *1 (Del. Super.) ("Such compelled testimony would place expert witnesses in an untenable position, requiring them to breach their duty of loyalty to the employers.").

[3] *Pinkett v. Brittingham*, 567 A.2d 858, 860 (Del. 1989) (holding that the trial court did not abuse its discretion by allowing plaintiff to call a medical expert retained by defendant where the expert conducted a medical examination "as an independent medical practioner and was not in the employ of [defendant]," the expert did not object to being so called, and the testimony was limited to the contents of the report).

case.[4] In *Pinkett*, as here, the expert was willing to testify on behalf of the opposing party.[5] *Pinkett* held that "where … an examining physician's trial testimony is limited to the contents of his report, the decision to compel his appearance at the behest of the opposing party is a discretionary one that may turn on the 'interests of fairness.'"[6] "The 'interests of fairness' include whether the objecting expert is in possession of unique facts, whether the expert is uniquely positioned, whether [defendant] has relied upon a report in pretrial preparation, the search for truth and/or other criteria."[7]

In the exercise of this Court's broad discretion in this matter and taking into account "the interests of fairness," particularly considering "the search for truth," this Court will allow Trala to call Sherkey as an expert witness, subject to certain limitations. Although the fact that Aube has apparently reached the same conclusion about the snowplow lights as Sherkey militates against allowing Sherkey to testify for Defendant, Sherkey did have the opportunity (as did Aube) to examine the snowplow lights very soon after the accident, which makes his testimony very important to "the search for truth" in this case. The fact that Sherkey's testimony is being used to corroborate[8] or "buttress" Aube's testimony does not, in this Court's mind and under the present circumstances, tip the analysis in Plaintiffs' favor and act to preclude Sherkey's testimony. It just would not be consistent with fairness for Plaintiff to vigorously attack Aube's conclusions about the snowplow's lights, with the Court and counsel aware that Plaintiff's original expert, Sherkey, agreed with the conclusions of Aube on the issue. Trala's other accident reconstruction expert, Glen Reuschling, was retained only after suit was filed and did not, unlike Sherkey, have an opportunity to inspect the lights on the snowplow immediately after the accident. Thus, Sherkey's testimony appears most important to the "search for truth," and it should not be hidden from the jury's view only because it

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[4] *Pinkett*, 567 A.2d at 860-61.

[5] *Id.* at 860.

[6] *Id.*

[7] *Winchester v. Hertrich*, 658 A.2d 1016, 1021-22 (Del. Super. Ct. 1995) (holding, in one instance, that plaintiff did not show that the "interests of fairness compel [the] presence" of defendant's expert at a trial deposition where the expert, who was employed by defendant, objected to either being deposed or testifying on behalf of the opposing party and holding, in another instance, that the "interests of fairness" permitted the opposing side to call another witness to testify where the witness was independent, had been stipulated as a trial witness and where the testimony would be limited to the contents of his report).

[8] Letter to the Court from David G. Culley, Esq., at 2 (April 6, 2006).

corroborates another witness' testimony. Such a decision would hinder rather than enhance the jury's function as fact-finder.

However, this Court finds that certain limitations need to be placed on Sherkey's potential testimony. Defendant Trala has represented to the Court and to opposing counsel that Sherkey's testimony will be limited to only those opinions found within the four corners of his report, and that defense counsel will "not elicit testimony from Mr. Sherkey as to who retained him so the jury need not know that he was initially retained by the plaintiffs…"[9] Furthermore, this Court, in reaching its decision, expects that Aube's testimony regarding whether the lights on the snowplow were working will be challenged by Plaintiffs. However, if Plaintiffs do not challenge Aube's testimony on this issue, then Defendant Trala may not call Sherkey as a witness. The Court will not allow a party to unnecessarily "buttress" its own expert with cumulative testimony by another expert witness who is not being called to testify by the party that had initially retained the expert.

Therefore, the Court finds that it is appropriate in the "interests of fairness" to allow Defendant Trala to call Sherkey as an expert witness at trial, subject to the limitations set forth above.

For all of the above reasons, Defendant Trala's application is **GRANTED.**

IT IS SO ORDERED.

Very truly yours,

oc: Prothonotary
cc: Louis B. Ferrara, Esquire (via facsimile & U.S. Mail)
Stephen P. Casarino, Esquire (via facsimile & U.S. Mail)

[9] Letter to the Court from David G. Culley, Esq., at 2 (April 6, 2006). *See also* Lori J. Henkel, Annotation, *Compelling Testimony of Opponent's Expert in State Court*, 66 A.L.R. 4th 213, 220 (1988) ("While some courts have permitted litigants calling for the testimony of an expert witness originally retained by the opposing party to elicit the witness' testimony that he or she was originally retained by the opposing litigant, other courts have refused to permit such inquiry regarding the expert's initial employment."). In light of defense counsel's representation, this Court need not address this issue.